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"It's not my job to change the law"

Judge Alito — In His Own Words

From January 9-12, 2006, Judge Samuel A. Alito, Jr., testified before the Senate Judiciary Committee regarding his nomination to be an Associate Justice of the Supreme Court. Through 18 hours of testimony and 700 questions, Judge Alito discussed the judicial process, his own commitment to impartial justice, and a wide variety of constitutional issues. The following is a collection of excerpts from Judge Alito's testimony.[1]

On the universal application of the law …

No person in this country, no matter how high or powerful, is above the law, and no person in this country is beneath the law. *(January 9)*

On the Constitution in a time of war …

Our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances. *(January 10)*

On results-oriented jurisprudence …

Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policy makers and we shouldn't be implementing any sort of policy agenda or policy preferences that we have. *(January 10)*

On the principle of one person/one vote …

Senator Grassley: Well, just to make sure that there is no lingering confusion then, let me ask you straight out: Do you believe in the principle of one person/one vote?

Judge Alito: I do. I think it's a fundamental part of our constitutional law. *(January 11)*

[1] Quotations taken from unofficial transcripts; exact page numbers not available at press time.

On the need for a "special justification" before reversing a precedent …

The Supreme Court has said that this is a question that calls for the exercise of judgment. They have said there has to be a special justification for overruling a precedent. There is a presumption that precedents will be followed. But it is not — the rule of stare decisis is not an inexorable command, and I don't think anybody would want a rule in the area of constitutional law … that said that a constitutional decision, once handed down, can never be overruled. *(January 10)*

On how he would treat a challenge to *Roe v. Wade* …

If the issue were to come before me as a judge, if I am confirmed and if this issue were to come up, the first question that would have to be addressed is the question of stare decisis.… It's a very important doctrine and that was the starting point and the ending point of the joint opinion in *Casey*. And then if I were to get beyond that, if a court were to get beyond the issue of stare decisis, then I would have to go through the whole judicial decision making process before reaching a conclusion. *(January 10)*

On his empathy for litigants who come before him …

It's not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those [immigration] cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time, and they were people who came to this country. When I have cases involving children, I can't help but think of my own children and think about my children being treated in the way the children may be treated in the case that's before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people whom I've known and admired very greatly who had disabilities. I've watched them struggle to overcome the barriers that society puts up. *(January 11)*

On a judge's open-mindedness …

Good judges develop certain habits of mind. One of those habits of mind is the habit of delaying reaching conclusions until everything has been considered. Good judges are always open to the possibility of changing their minds based on the next brief that they read or the next argument that is made by an attorney who is appearing before them, or a comment that is made by a colleague during the conference on the case. *(January 9)*

On changing his mind in the middle of the judicial process …

There have been numerous cases in which I've … been given the job of writing an opinion … and in the process of writing the opinion, I see that the position that I had previously was wrong. I changed my mind. And then I will write to the other members of the panel and I will say, I have thought this through and this is what I discovered and now I

think we should do the opposite of what we agreed, and sometimes they'll agree with me and sometimes they won't. *(January 10)*

On limited role of judiciary …

The judiciary has to protect rights, and it should be vigorous in doing that, and it should be vigorous in enforcing the law and in interpreting the law … in accordance with what it really means and enforcing the law even if that's unpopular. But although the judiciary has a very important role to play, it's a limited role.… It should always be asking itself whether it is straying over the bounds, whether it's invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law. And that has to be a constant process of re-examination on the part of the judges. *(January 10)*

Judges don't have the authority to change the Constitution. The whole theory of judicial review that we have, I think, is contrary to that notion. The Constitution is an enduring document and the Constitution doesn't change. It does contain some important general principles that have to be applied to new factual situations that come up. But in doing that, the judiciary has to be very careful not to inject its own views into the matter. It has to apply the principles that are in the Constitution to the situations that come before the judiciary. *(January 10)*

On the difference between a judge and a private citizen …

The role of a practicing attorney is to achieve a desirable result for the client in the particular case at hand, but a judge can't think that way. A judge can't have any agenda. A judge can't have any preferred outcome in any particular case. And a judge certainly doesn't have a client. The judge's only obligation — and it's a solemn obligation — is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires. *(January 9)*

On the insulation of judges from public opinion …

I think that the Court, and all the courts — the Supreme Court, my court, all the Federal courts — should be insulated from public opinion. They should do what the law requires in all instances. That's why … the members of the judiciary are not elected. We have a basically democratic form of government, but the judiciary is not elected, and that's the reason — so that they don't do anything under fire. They do what the law requires. *(January 10)*

On the applicability of the Constitution in a changing society …

The liberty component of the 5th Amendment and the 14th Amendment … embody the deeply rooted traditions of the country, and … those rights apply to new factual situations that come up. As times change, new factual situations come up, and the principles have to be applied to those situations. The principles don't change. The Constitution itself doesn't change, but the factual situations change, and as new situations come up, the principles and the rights have to be applied to them. *(January 10)*

I think the Framers recognized that times would change, new questions would come up. So they didn't purport to adopt a detailed code, for example, governing searches and seizures.… They could have set out a detailed code of search and seizure. They didn't do that. They said that the people are protected against unreasonable searches and seizures, and they left it for the courts — and, of course, the legislative body can supplement this — to apply that principle to the new situations that come up. Now, when that is done, it doesn't amount to an amendment of the Constitution or a changing of the Constitution…. It involves the application of a constitutional principle to the situation at hand. *(January 11)*

On the use of foreign law in interpreting the U.S. Constitution …

I don't think that foreign law is helpful in interpreting the Constitution. Our Constitution does two basic things. It sets out the structure of our Government and it protects fundamental rights. The structure of our Government is unique to our country, and so I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful in deciding questions relating to the structure of our Government. As for the protection of individual rights, I think that we should look to our own Constitution and our own precedents. Our country has been the leader in protecting individual rights. If you look at what the world looked like at the time of the adoption of the Bill of Rights, there were not many — in fact, I don't think there were *any* —that protected human rights the way our Bill of Rights did. We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution. *(January 10)*

On the role of legislative history in statutory interpretation …

When I interpret statutes, and that's something that I do with some frequency on the court of appeals, where I start and often where I end is with the text of the statute. And if you do that, I think you eliminate a lot of problems involving legislative history and also with signing statements. *(January 10)*

When there is an ambiguity in the statute, I think it is entirely legitimate to look to legislative history, and as I said, I have often done that. I think it needs to be done with caution. Just because one Member of Congress said something on the floor, obviously that doesn't necessarily reflect the view of the majority who voted for the legislation. So it has to be done carefully and, I think, with a realistic evaluation of the legislative process. But I'm not one of the judges who thinks that you should never look to legislative history. I think it has its place. *(January 11)*

On the presumptive constitutionality of acts of Congress …

Acts of Congress are presumptively constitutional, and … I think that means something. Members of Congress take an oath to support the Constitution, and I think that the presumption of constitutionality means a lot. And I think that judgments that are reached by the legislative branch in the form of findings of fact, for example, are entitled to great respect because of the structure of our Government, the fact that the basic policy decisions

are supposed to be made by the legislative branch and carried out by the executive branch, and also for the practical reason or the functional reason that Congress is in a better position to evaluate conditions in our country and conditions in our society and to make findings and to determine what's appropriate to deal with the social and economic problems that we face. *(January 12)*

On Congress's broad powers under the Commerce Clause …

I don't think there's any question at this point in our history that Congress's power under the Commerce Clause is quite broad. I think that reflects a number of things, including the way in which our economy and our society have developed, and all of the foreign and interstate activity that takes place. *(January 10)*

On Congress making factual findings in support of laws …

The judiciary is not equipped at all to make findings about what is going on in the real world, not this sort of legislative findings. And Congress, of course, is in the best position to do that. You have constituents. Members of Congress hear from their constituents. Congress can have hearings and examine complex social issues, receive statistical data, hear testimony from experts, analyze that and synthesize that and reduce that to findings. And when Congress makes findings on questions that have a bearing on the constitutionality of legislation, I think they are entitled to great respect. *(January 10)*

On his treatment of immigration cases in light of congressional intent …

In the area of immigration, Congress has spoken clearly. And as to factual decisions that are made by an immigration judge, what Congress has told us is you are not to disturb those unless no reasonable fact finder could have reached the conclusion that the immigration judge did. And I very often see a record where I think it's doubtful. I say to myself, "I might have decided this differently if I were the immigration judge." But I wasn't there. I didn't see the witnesses testify personally. And Congress has told me what my role is there. My role is not to substitute my judgment for that of the immigration judge. My job is to say, "Could a reasonable person have reached the conclusion that the immigration judge did?" And if I find that a reasonable person could have reached that conclusion, then it's my job to deny the petition for review. And that's what I do in those instances. *(January 11)*

On the harm to justice if a nominee were to prejudge an issue …

In my mind, the most important reason is that to do that would undermine the entire judicial decision-making process. We have a process for deciding legal issues, and it is critically important that we stick to that process. And that means that when an issue comes before us, the briefs are not a formality. The arguments of the attorneys are not a formality. We should read those very carefully, and we should study the issue, and we should study all the authorities that are cited to us and carefully consider all of the arguments that are presented to us — both in the briefs and in the attorneys' oral presentation — and *then* go into the conference and discuss the case among the members of the court.… We shouldn't decide those questions, even in our own minds, without going through that whole process. If we

announce — if a judge or a judicial nominee announced before even reading the briefs or getting the case or hearing the argument what he or she thought about the ultimate legal issue, all of that would be rendered meaningless, and people would lose all their respect for the judicial system, and with justification, because that is not the way in which members of the judiciary are supposed to go about the work of deciding cases. *(January 11)*

As a judge on the court of appeals, or if I'm confirmed as a Justice on the Supreme Court, it would be wrong for me to say to anybody who might be bringing any case before my court, "If you bring your case before my court, I'm not even going to listen to you. I've made up my mind on this issue. I'm not going to read your brief. I'm not going to listen to your argument. I'm not going to discuss the issue with my colleagues. Go away, I've made up my mind." That's the antithesis of what the courts are supposed to do. *(January 11)*

On the *Kelo* decision's effect on homeowners …

When someone's home is being taken away using the power of eminent domain, that is a blow to a lot of people. Even if they're going to get compensated at fair market value for their home, the home often means more to people than just dollars and cents. It's a place that often involves a lot of emotion. They have emotional attachments to it. They've lived in it a long time. They're familiar with the neighborhood. They want to be with the neighbors. They want to stay in the same area. They may have emotional attachments to things in the home. So it is a tremendous blow, and I suppose that when — I would imagine that when someone's home is being taken away, a modest home, for the purpose of building a very expensive commercial structure, that is particularly galling. *(January 12)*

On keeping his personal religious beliefs out of his judicial opinions …

My personal religious beliefs are important to me in my private life. They are an important part of the way I was raised, and they have been important to Martha and me in raising our children. But my obligation as a judge is to interpret and apply the Constitution and the laws of the United States, and not my personal religious beliefs or any personal moral beliefs that I have, and there is nothing about my religious beliefs that interferes with my doing that. I have a particular role to play as a judge and that does not involve imposing any religious views that I have, or moral views that I have, on the rest of the country. *(January 11)*

On how to view him in light of other Supreme Court Justices …

I think that every Supreme Court Justice is an individual, and I think every nominee is an individual, and no nominee can ever be a duplicate of someone who retires, and particularly when someone retires after such a distinguished career and such a historic career as Justice O'Connor. Nobody can be expected as a nominee to fit that mold.… If I'm confirmed, I'll be myself. I'll be the same person that I was on the court of appeals. *(January 11)*

I think if anybody reads the opinions that I've written and the opinions that I've joined, they can see exactly the sort of jurist that I am. They will find some opinions I'm sure that they

will disagree with. But if they look at the whole set of opinions that I've written or joined, they can get a very clear picture of me. I'm not like anybody else. I don't claim to have the abilities of some of the distinguished members of the Supreme Court now or in the past. I have … whatever abilities that I have, but they are my own. *(January 11)*

On the inappropriateness of viewing justice on a "scorecard" basis …

I don't think a judge should be keeping a scorecard about how many times the judge votes for one category of litigant versus another in particular types of cases. That would be wrong. We are supposed to do justice on an individual basis in the cases that come before us. But I think that if anybody … looks at the cases that I have voted on in any of the categories of cases that have been cited, they will see that there are decisions on both sides. In every type of employment discrimination case, for example, there are decisions on both sides. *(January 11)*

On what the "unitary Executive" theory is — and what it is not …

The Constitution says that the President is given the Executive power, and the idea of the unitary Executive is that the President should be able to control the executive branch, however big it is or however small it is, whether it is as small as it was when George Washington was President or whether it is as big as it is today or even bigger. … It doesn't have to do with the scope of executive power. It does not have to do with whether the Executive power that the President is given includes a lot of unnamed powers or what is often called inherent power.… It is the difference between scope and control. And as I understand the idea of the unitary Executive, it goes just to the question of control. It doesn't go to the question of scope. *(January 10)*

On ROTC and the Concerned Alumni of Princeton …

I have tried to think of what might have caused me to sign up for membership. … The issue that had rankled me about Princeton for some time was the issue of ROTC. I was in ROTC when I was at Princeton, and the unit was expelled from the campus. And I felt that was very wrong. I had a lot of friends who were against the war in Vietnam, and I respected their opinions, but I didn't think that it was right to oppose the military for that reason. And the issue — although the Army unit was eventually brought back, the Navy and the Air Force units did not come back — the issue kept coming up. And there were people who were strongly opposed to having any unit on campus. And the attitude seemed to be that the military was a bad institution and that Princeton was too good for the military, and that Princeton would somehow be sullied if people in uniform were walking around the campus, that the courses didn't merit getting credit, that the instructors shouldn't be viewed as part of the faculty. And that was the issue that bothered me about that. *(January 10)*

On lack of financial gain related to Vanguard case …

Senator Hatch: In other words, there was never any possibility of you benefiting financially no matter how that case came out. Is that right?

Judge Alito: Absolutely no chance.

Senator Hatch: And you actually did recuse yourself when the question was eventually raised, even though you didn't have to.

Judge Alito: That's correct, Senator. *(January 10)*

On his pledge to the Senate …

Fifteen years ago, when I was sworn in as a judge of the court of appeals, I took an oath. I put my hand on the Bible, and I swore that I would administer justice without respect to persons, that I would do equal right to the poor and to the rich, and that I would carry out my duties under the Constitution and the laws of the United States. And that is what I have tried to do to the very best of my ability for the past 15 years. And if I am confirmed, I pledge to you that that is what I would do on the Supreme Court. *(January 9)*